Supreme Court of the United States

OCTOBER TERM 1944

No. 487

JOSEPH T. WATERS,
Petitioner,

against

KINGS COUNTY TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS J. CASTELLANO,
Counsel for Respondent.

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Statement

The Circuit Court unanimously affirmed on August 23, 1944 (p. 370) a judgment of the United States District Court for the Eastern District of New York, entered on November 4, 1943, in favor of defendant, dismissing plaintiff's amended complaint upon the merits (267-269). The judgment was rendered upon the unanimous verdict of a jury against the plaintiff, after a five (5) day trial before Judge Campbell and a jury (266, 268). In a previous five (5) day trial of the action before Judge Inch and a jury, the jury disagreed (273, 275, 276).

The plaintiff now seeks a further review by this Court, claiming that there was error in the admission of certain evidence and that, as matter of law, a verdict should have been directed in his favor. Each of these questions was carefully reviewed by the Circuit Court, and the rulings of the District Court unanimously affirmed (352-356). Moreover, the plaintiff applied *ex parte* to the Circuit Court

for a rehearing, elaborating on these two claimed errors, but the application was denied (358-368). It is respectfully submitted that the pertinent facts, which will be discussed under the appropriate points, clearly show that there is no important law question involved warranting a further review by this Court.

POINT I

Defendant's Exhibit A was properly received in evidence.

The trial judge ruled that defendant's Exhibit A (147, 318) was admissible in evidence under 28 U. S. C. A., sec. 695, as a writing or record made in the regular course of business (145-149). The Circuit Court agreed, holding "that the business of a corporate trustee justifies the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so kept are made 'in the regular course of business.'" The Circuit Court unanimously decided that the ruling was not in conflict with *Palmer* v. *Hoffman*, 318 U. S. 109 (356).

The petitioner fails to state the record facts which justify the ruling of the Courts below. These facts demonstrate that defendant's Exhibit A, which was the bank's history sheet or diary relating to the William E. Barber Estate and the Hendrickson Trust, was not prepared in anticipation of litigation, as plaintiff contends, but that such records were always prepared and used by the bank in all estates and trusts administered by it and were actually necessary for the proper administration of its trust business. The business of the bank in its trust department could not be carried on without such records. Failure to keep such records in the performance of its trust duties would lead to all sorts of difficulties, and probably result in severe censure of the bank by the courts in which it is called upon to account.

As Allen, the vice-president of the bank explained, the bank had no one with the title of Trust Officer, but that he was in charge of the trust end of the banking business. Over him were the bank's Trust Committee and Executive Committee to which he reported and made recommendations. Under his immediate supervision were six men, among whom all of the trust work was divided. Lambrecht, a clerk in the Trust Department, was one of these six men. He was in direct charge of a number of accounts and "it was his duty to know the particular provisions of the instrument that created those accounts, to know the people and to know what we could do, what they wanted to be done, and in any case negotiations were carried on by him and he would bring them" to Allen who, in turn, reported to the Trust Committee or to the Executive Committee (196-198).

The final decisions of the bank were not made by Lambrecht or by Allen but by the Trust or Executive Committee. These decisions were incorporated in the minutes of the committees, several of which were offered in evidence by the petitioner (81, 292, 86, 315, 316, 177, 317). A comparison of such committee minutes with the bank's history sheet, prepared by Lambrecht and supplemented by Allen (161, 162, 202, 203), show how the history sheet was employed as the basis of the committees' discussions and decisions.

The plaintiff's brief assails the trustworthiness and reliability of the bank's history sheet. However, a comparison of the entries on the history sheet with the testimony of all of the witnesses on the trial and the documentary evidence adduced, will quickly confirm the fact that the entries were made with substantial accuracy and with care. Additionally, the two men who were responsible for writing the history sheet, Lambrecht and Allen, were in court and were subjected to exhaustive cross-examination. While plaintiff is willing to vouch for the trustworthiness of that part of the history sheet which pleases him (Exhibit

12), he would repudiate all the rest as contained in Exhibit A (81, 294, 147, 318-345).

The bank's history sheet was not offered in evidence by defendant until plaintiff had first introduced a most material part of it into evidence, as part of his case, over defendant's objection, and had used it to serve his own purposes (81). So much of defendant's Exhibit A as consisted of the bank's history sheet under date of February 18, 1941, prepared by Lambrecht, was first offered in evidence by the plaintiff, as plaintiff's Exhibit 12 (admitted 81, printed as part of defendant's Exhibit A, 318-345, 294).

The obvious purpose of the plaintiff in introducing Exhibit 12 into evidence was because plaintiff believed that it contained many damaging admissions by the bank that would greatly aid plaintiff's case. The attempted analysis of the $450,000 offer made by plaintiff's prospect on February 17, 1941, made by Lambrecht, a clerk in the bank's Trust Department, with no authority whatsoever to bind the bank or its trust by making admissions (126, 195, 197, 198), was seized upon by plaintiff as containing admissions by the bank that the offer of plaintiff's prospect was for $470,000 instead of only $450,000; that plaintiff was recognized as the bank's broker; that the Smith claim to commissions was disregarded by the bank; that the price of $470,000 could be improved upon; that a sale on the proposed terms would be of great advantage to the stockholders; and that the analysis contained other claimed admissions against the bank's interest (324-328).

These alleged admissions went to the very heart of the case; they involved the most important issues that were submitted to the jury (253-262). Certainly, under these circumstances, the defendant had the right to offer in evidence the rest of the history sheet in order that the jury might have the benefit of the whole story, particularly with respect to the bank's official attitude concerning Lambrecht's claimed admissions. For where part of a writing has been received in evidence as containing admissions, the

party against whom it is offered has the right to introduce the remainder of the writing to explain or qualify the alleged admissions or to modify or destroy their effect (*Rouse* v. *Whited*, 25 N. Y. 170; *Platner* v. *Platner*, 78 N. Y. 90; *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Fleischman* v. *Toplitz*, 134 N. Y. 349).

The plaintiff's claim that Exhibit A was not offered for the purpose of explaining or qualifying the alleged admissions, contained in Exhibit 12, is without substance. The defendant simply offered the record in evidence, and the trial court admitted it (146, 147). Defendant's counsel was not asked to state the purpose of the offer. In order for the jury to decide what importance should be attached to the alleged admissions of the bank's clerk, Lambrecht, contained in Exhibit 12, it was necessary and important to put that record in its proper setting as an integral part of the entire history sheet, Exhibit A. Only in that way could the jury fairly determine what the officials of the bank admitted and what they did not admit with respect to plaintiff's claim.

Although plaintiff introduced part of defendant's Exhibit A in evidence in presenting his own case, he objected to the rest "as containing self-serving declarations," and entries as to irrelevant and incompetent transactions (146-149). The first objection is pointless under the language of the statute; if the conditions of the statute are otherwise complied with, the writing or record is admissible even though it contains self-serving declarations (Richardson On Evidence, 5th Ed., sec. 668). The second objection called for specific objection as to particular entries before the Court could rule on them. No such objections were made. Nor was any objection made that the entries were not made in the regular course of business, as they clearly were so made (81, 145-149, 156-162, 202, 203, 232, 233). Moreover, both writings, defendant's Exhibit A and plaintiff's Exhibit 12, the latter being an integral part of the former (294), were relevant and material to the issues of fact involved

in the case. Hence, the only disputed objection is as to competency. But the plaintiff, having first introduced part of Exhibit A, certainly waived the question of competency as to the remainder of the exhibit.

Under Rule 43 (a) of the Rules of Civil Procedure, the exhibit was admissible because it would be admitted in evidence both in the State of New York (Civil Practice Act, sec. 374a), and in the federal courts (28 U. S. C., sec. 695).

The plaintiff relies on *Palmer* v. *Hoffman*, 318 U. S. 109. He claims that the ruling here is in conflict with that case. The question involved in the *Palmer* case was the admissibility in evidence of an accident report made by the engineer of a train to his employer, as part of an established routine. On the trial, the railroad offered the report in evidence. The trial court excluded it. The Circuit Court affirmed, one judge dissenting. This Court affirmed, holding that the engineer's report, although made pursuant to an established routine, was not a record made in the regular course of business within the purview of the statute. The rule was epitomized in these words:

> "In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise *as a railroad business.* Unlike payrolls, accounts receivable, accounts payable, bills of lading *and the like,* these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." (Italics ours).

This Court also explained what was intended by the words "regular course" of business, as contained in the statute:

> "But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

But, as pointed out above, the plaintiff did not object to Exhibit A on the trial upon the ground that it was not a record made in the regular course of business (146-149). He merely asserted that certain entries, without specifying them, were self-serving or irrelevant or incompetent. Assuming, therefore, but without conceding that plaintiff may now raise an objection not raised at the trial, the objection is without merit.

The plaintiff contends that this exhibit had nothing to do with the defendant's business as a bank or trust company. For that matter, neither was the sale of the stock the business of the bank, as such. The sale of the stock was made by the bank in its fiduciary capacity only; the record did cover the business of the Barber Estate, which was the bank's business insofar as it was a co-executor and co-trustee of that estate (3, 4, 297, 298).

The defendant here is a trust company. It is a corporate trustee, with many employees, not a one-man business. Its essential function is to act as a trustee; that is the inherent nature of its business. The avowed object and primary purpose of its creation is to properly supervise and carefully administer the trust estates committed to its care as a fiduciary (*Gause* v. *Commonwealth Trust Co.*, 196 N. Y. 134, 153).

As a trustee, certain methods are systematically employed by the bank in the conduct of its business. It conducts its operations and acts through a number of employees, officers and committees, all supervised by a board of trustees (196-198, 202, 203). Such a trustee must keep and be in a position to render periodic reports or accounts of its activities. Such reports are compulsory for the systematic conduct of the enterprise of a trustee. Trusteeing is defendant's business, and it is mandatory for a corporate trustee to keep detailed records of day by day events affecting its trusts so as to be able to properly conduct its internal affairs and come to important decisions, as well as to give an account of its stewardship, whenever called upon to do

so, not only to the courts but to the beneficiaries of the trusts and others interested, as well. A trustee's records must be kept for that definite business purpose and not primarily for the purpose of any litigation that might conceivably arise. The primary utility of defendant's Exhibit A is in carrying on its business as a trustee, not in litigating. Defendant's Exhibit A is the very kind of a record contemplated by the statute.

There appears to be no sound reason, therefore, why the business records of such a corporate trustee should not be received as evidence in chief within the purview of the statute. In any event, as has been shown, a vital part of the history sheet having been received in evidence as part of the plaintiff's case, it was entirely proper to admit the balance in order to get the whole truth before the jury.

But the petitioner now insists that at least certain parts of defendant's Exhibit A should have been excluded. He refers specifically to the entries made under date of March 5th and 6th, 1941 (336, 337, 339). The entry of March 6th was not specifically objected to; if it had been it would have been pointless. If deemed self-serving, that would affect its weight, not its admissibility. Plaintiff asserts the entry of March 5th included the advice counsel gave to the bank and that such advice is no defense to such an action as this. No such objection, however, was made at the trial. Plaintiff's counsel merely asked the Court to read an entry and give an opinion as to whether it was proper. No objection was made specifying any particular ground. The Court ruled that the entry was admissible as going "to show whether they were acting in good faith, that they had taken the advice of counsel", and the plaintiff excepted (149). The opinion of the Circuit Court is silent on this ruling; apparently it was not deemed important enough to warrant discussion.

The defendant neither pleaded nor urged advice of counsel as a defense to plaintiff's complaint. But the plaintiff did specifically charge the defendant with bad faith, arbitrariness, unfairness, deceit and fraud (6, 7). The

good faith of defendant having been thus attacked and directly put in issue, the trial judge permitted the entry to stand as bearing on the issue of good faith. Under the circumstances, this ruling was clearly proper. If it were error, it was harmless and the jury certainly was not prejudiced thereby, particularly in view of the fact that the plaintiff himself had previously offered evidence showing that as early as February 19, 1941, the bank had called upon its attorneys for advice with respect to this transaction (292). Moreover, the error, if any, was occasioned by the plaintiff's improper introduction into evidence of plaintiff's Exhibit 12 over defendant's objection (81). That exhibit should not have been received in evidence in the first instance until plaintiff had affirmatively demonstrated that Lambrecht had the power and authority to bind the bank by his admissions, which, in fact, he did not have (81, 126, 195, 197, 198). If two errors have thus been committed in the admission of evidence, surely the plaintiff who provoked the initial error has no ground for complaint.

POINT II

The issue of plaintiff's employment by the bank was properly submitted to the jury.

The simplest and quickest way of substantiating this point is to quote from the opinion of the Circuit Court (pp. 352-3), supplying the appropriate folio references to the record:

> "At the conclusion of the evidence the plaintiff moved for a directed verdict (251). He contends that denial of his motion was error and that we should grant it. Assuming that under Rule 50 (b), F. R. C. P., 28 USCA following §723 (c), and the practice sanctioned in *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, this court has power to direct

a verdict in the appellant's favor, this is not an occasion for its exercise. There was plainly an issue of fact whether the plaintiff was employed by the Bank to sell stock (which it owned as trustee for two estates) or whether it merely told him in effect that it would consider any offer he might submit. The plaintiff himself testified in an examination before trial that he sought out Mr. Allen, vice-president of the Bank, and asked 'if he would have any objection to my endeavoring to find a bidder for the stock * * *,' and that Mr. Allen refused to put a price on the stock but said 'they would be willing to entertain any bid I might bring in from a representative or responsible party' (120). After some further talk Mr. Allen referred the plaintiff to Mr. Lambrecht, an officer in the trust department of the Bank, who testified at the trial: 'I told him at that time that he was a volunteer that came in, that we didn't like to sell the stock, that it wasn't necessary, but we would be glad to do it if we got a favorable price,' and that any offer would have to be submitted to the Bank's executive or trust committee for final approval. Mr. Lambrecht refused the plaintiff's request for an exclusive agency and declined to give him any written evidence of authority to sell the stock (128-130). In the light of this testimony the plaintiff's argument that the refusal of an exclusive agency 'necessarily implies that he was to have a non-exclusive agency' is, to put it mildly, amazing. Equally futile is the argument that employment by the Bank is corroborated by its letters referring to the plaintiff as 'the broker,' e. g. exhibits 4, 12 and 17 (284, 294, 312). From this the plaintiff would draw the inference that the Bank recognized him as *its* broker, despite the fact that other letters of the Bank expressly referred to him as agent or broker of the prospective purchaser, e. g. exhibits 5, 6 and 8 (285, 286, 289), from whom, concededly, he was to receive whatever commission was to be paid him (5, 6, 283). Further reference to specific items of conflict in the evidence seems unnecessary to demonstrate that the issue of employment by the Bank was a jury question. It should also be evident from the

foregoing that the jury's verdict resolving the issue against the plaintiff cannot be upset for want of supporting evidence."

But, despite these established facts, the plaintiff still insists upon urging that a mere request to a broker to "submit offers" is proof of employment, as matter of law, citing *Shapiro* v. *Greenwich Savings Bank,* 266 A. D. 359, aff'd 293 N. Y. (July 20, 1944). All that the *Shapiro* case held was that: "There was *prima facie* proof that plaintiff, Shapiro, had been asked to submit offers and, thus, of employment" (266 A. D. 360). Unlike this case, no facts to the contrary appear in the *Shapiro* case. Here the plaintiff was told that he was a "volunteer" (128). He admitted that he was not acting as broker for the bank (43). His commissions were to be paid only by the purchaser (283). The plaintiff purported to represent his prospect and no one else. In the light of such facts, a double employment could not be inferred (*Knauss* v. *K. B. Co.,* 142 N. Y. 70, 75; *Reese* v. *Texas Co.,* 42 N. Y. S. 2nd 545, 550; *Wendt* v. *Fischer,* 243 N. Y. 439).

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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